REPORT TO THE PRESIDENT

ON PROPOSED DENIAL OF EXECUTIVE CLEMENCY FOR

CLARENCE AARON

Offense:	Conspiracy to possess with intent to distribute cocaine and cocaine base; possession with intent to distribute cocaine.
Sentence:	Life imprisonment; five years' supervised release; forfeiture of $1,500.
Date:	December 10, 1993 (reimposed upon remand on July 30, 1996).
District:	Southern Alabama.
Relief sought:	Commutation of sentence.

Summary of essential facts:

Petitioner seeks commutation of a life sentence imposed for his participation in a drug-trafficking venture that started in his home town of Mobile, Alabama. Then 23 years old, petitioner was attending Southern University in Baton Rouge, Louisiana. There he came to know Ricky Chisholm, a classmate whose brother, Elwyn Jerome ("Gary") Chisholm, was a bail bondsman involved in drug dealing.

At the same time, an investigation that had begun in September 1991 led to a cooperating witness who advised that he received "crack" cocaine from Marion Teano Watts on several occasions. Watts, a crack distributor in Mobile, was a high school friend of petitioner. When Watts lost his source for cocaine powder in 1992 and began looking for a new source, his connection with petitioner led to petitioner's involvement in the two drug transactions underlying the charges of which he was convicted.

The first transaction related to the purchase of nine kilograms of powder cocaine in early June 1992, which was initiated by a call to petitioner from Robert Hines, another high school friend of petitioner and associate of Watts. In turn, petitioner, who was in Mobile at the time, contacted Gary Chisholm, who lived in Baton Rouge. Chisholm offered the opportunity to buy 10 kilograms for $200,000. After picking up the cash from Watts, petitioner, his cousin James Perry, and Hines drove to Baton Rouge with the money, but Chisholm advised he did not have the drugs there and instead would have them available in Houston. Petitioner and Hines drove to Houston in order to get the drugs and, before leaving Baton Rouge, arranged for Chris Wiley (the nephew of petitioner's landlord) and Perry to take the money by bus to Houston. On Chisholm's

instruction, petitioner contacted a person named "Giro," who delivered nine kilograms of cocaine in the presence of petitioner, Hines, and Perry. They sent Wiley by bus with the drugs to Mobile, and petitioner and Perry returned to Mobile, where they picked up Wiley and the drugs at the bus station and delivered the drugs to Watts. In petitioner's presence at a residence in Mobile, Watts "cooked" some of the powder into crack.[1] Petitioner supplied a scale to weigh the finished product. He received $1,500 for his participation in this transaction.[2]

In the second transaction in late June 1992, Watts wanted to buy 15 more kilograms of powder from Hines and called petitioner after Watts' calls to Hines went unanswered. Petitioner in turn called Chisholm to set up the transaction, which followed a pattern similar to the earlier one. Petitioner sent Wiley by bus to Houston with the cash, which Watts had supplied, and drove with Hines to New Orleans, where the two men boarded a plane for Houston. Once in Houston, petitioner retrieved the money and gave it to Chisolm, in anticipation of a meeting between Hines and Chisholm at a hotel in Houston, Texas. While there, Chisholm and Hines were robbed of the $250,000 by two gunmen, causing the sale to be aborted.[3]

Petitioner was first indicted in January 1993, along with Chisholm, Jairo Casido Plaza ("Giro"), and an unknown person who was later determined to be Chris Wiley. He was arrested on February 1 and released on bail. An initial trial held in early August 1993 resulted in a mistrial. A superseding indictment was filed on August 20, 1993, and in a second jury trial at the end of September 1993, petitioner was found guilty; he testified in both trials, admitting that he took two trips to Houston but denying that their purpose was to complete drug transactions. In fact, in the first trial he claimed that he met with Chisholm because he was interested in pursuing a career as a bail bondsman. Chisholm was also convicted.

Petitioner was sentenced to life imprisonment on December 10, 1993. His life sentence was far higher than the 10-year mandatory minimum but was mandated under the Sentencing Guidelines. The Guidelines computations reflected the highest possible offense level attributable to drug quantity (achieved when the offense involved more than 15 kilograms of crack),[4] a two-level enhancement for obstructing justice by perjuring himself at trial, and a three-level

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[1]Hines testified that one kilogram of crack was produced during that "cook" and that he and petitioner drove around to distribute it that day.

[2]Since Chisholm, through Giro, only supplied nine kilograms, he was paid only $190,000. According to Hines, $5,000 was returned to Watts, $1,000 each was paid to James Perry and to Wiley, and petitioner and Hines split the balance. In addition to the two transactions for which petitioner was convicted, Hines testified that in the Spring of 1992, petitioner called him and asked him to pick him up in Biloxi, where he was holding a half-kilogram of cocaine powder. Hines then transported petitioner, Perry, and the drugs to Mobile, where petitioner helped cook it into crack and drove Hines around town to distribute the finished product to his customers. According to Hines, he and petitioner split the proceeds.

[3]Wiley testified that after the robbery, Wiley made another trip with petitioner to Houston and carried a package of cocaine on his return, which petitioner cooked into crack at his parents' home in Mobile.

[4]Under a retroactive amendment to the drug guidelines, the highest possible enhancement attributable to drug quantity is achieved for 1.5 kilograms or more of crack. Because petitioner received enhancements totaling five offense levels for other reasons, his total offense level under the amended guideline would still be 43, requiring a life sentence.

enhancement for being a leader or organizer of the criminal activity, for a final offense level of 47; offense level 43, the highest level under the sentencing grid, mandates a life sentence in all criminal history categories. The $1,500 petitioner was paid for his involvement in the nine-kilogram transaction was ordered to be forfeited to the United States. Chisholm was also sentenced to life imprisonment.

Watts pleaded guilty to the conspiracy count and was sentenced to 14 years in prison; the court later reduced the sentence to nine years, resulting in Watts' release in early 2000 after serving seven years and 10 months. According to petitioner's clemency counsel, Watts "reportedly, is again distributing and selling crack in Mobile." Hines pleaded guilty and received a prison term of 10 years, which was later reduced to five years, of which he served four years and four months. Again, according to petitioner's attorney, Hines "reportedly, is involved again in drug trafficking." Another member of the drug ring, Ron Smith, similarly pleaded guilty and was sentenced to eight years and four months, which was reduced to five years; he was released from prison in 1997. Wiley pleaded guilty to the conspiracy count and received a prison sentence of 35 months, resulting in his release from prison in 1995. Perry was never charged; according to petitioner's attorney, he is currently addicted to crack. Giro remained a fugitive and the charges against him were dismissed in August 1996.

The convictions of both petitioner and Chisholm were upheld on appeal, but their sentences were vacated and the case remanded for resentencing. On remand, the same sentence was imposed on petitioner; no petition for collateral relief was filed on his behalf. Upon resentencing, Chisholm received a term of 292 months.[5]

Petitioner has been continuously incarcerated since the verdict was returned on September 30, 1993. He has not incurred any incident reports during that time. He has no other criminal record and has no history of using drugs.

Grounds for clemency and official comments:

Now 34 years old, petitioner applied for the clemency in the waning days of the Clinton Administration. His application was forwarded to the Justice Department by the Criminal Justice Policy Foundation, which continues to feature petitioner's clemency case on its website.[6] A copy of the clemency petition was transmitted by facsimile to President Clinton by Congressman Sonny Callahan. Describing the offense as one in which petitioner was a "low-level participant"

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[5] *United States v. Chisholm*, 73 F.3d 304 (11th Cir. 1996). Petitioner's sentence was set aside due to a computation error. Although petitioner had not raised the issue on appeal, the appellate court faulted the trial judge for using a one-to-one conversion formula for converting powder to crack without taking evidence on that point. Upon resentencing, the same sentence was imposed because the conversion formula to which the parties stipulated (one gram of powder yields .89 grams of crack) resulted in a quantity of crack sufficient to achieve the highest possible base offense level under the drug guideline. Chisholm's sentence was reversed because he was sentenced for crack cocaine but the court of appeals agreed with his claim that the conversion of the powder into crack was not foreseeable and was outside the scope of the criminal activity in which he agreed to participate. Chisholm's petition for a writ of certiorari was denied in 1996. *Chisholm v. United States*, 525 U.S. 884 (1998).

[6] A description of petitioner's case and a call for support of his clemency request can be found at the Criminal Justice Policy Foundation's website, http://www.cjpf.org/clemency/clarenceaaron.html The website has a hyperlink to the Public Broadcasting System's website, which displays an interview with petitioner taken from its *Frontline* program, "Snitch." See discussion at p. 6, *infra*. The text of the material reached through the hyperlink can be found at http://www.pbs.org/wgbh/pages/frontline/shows/snitch/aaron.htm

with no knowledge of the intended use of the cocaine, the petition asserted as grounds for clemency the following: "I believe my sentence was unfairly harsh in light of the fact co-defendants who were much higher level participants in the conspiracy received much lighter sentences. . . . I was not an active participant, but only assisted in one buy." Petitioner further pointed to his lack of a criminal record, his status as a college student at the time of the offense, and his asserted inability to cooperate because he "didn't know anything."

Ultimately, petitioner submitted an amended application, supported by a memorandum written by his attorney.[7] The memorandum is supplemented by an appendix containing numerous documents, including affidavits from petitioner,[8] family members, and friends, among others. Letters from petitioner, his family, and supporters have been received by the Pardon Attorney as well.

In his affidavit, petitioner "acknowledge[s] full responsibility for the role [he] played in these transactions" and states that he is "ashamed that [he] had any involvement with cocaine." He states that he "fell far short" of the moral standards with which he was raised, "brought shame on [his] family," for which he feels "terrible remorse," and regrets not only "the weakness that led [him] to involvement in a drug deal," but that "[he] further compounded [his] mistake by not admitting to [his] participation in the conspiracy at trial." He adds that while in prison he has "had the time to reflect upon the wrongdoing that led to [his] conviction and incarceration," and has "come to realize that, in helping continue the flow of drugs into the Mobile community, [he] was helping to destroy the community [he] loved," and "[a]t the time, . . . did not think through the consequences of [his] actions." As grounds for commutation, he refers to a memorandum of his attorney in support of his clemency application.

In the memorandum, petitioner's attorney argues that petitioner's conviction "was the result of aberrational conduct that he will forever regret." Citing the then recent death of petitioner's grandfather, who raised and financially supported petitioner, as the occasion of a need for money in the Spring of 1992,[9] petitioner's attorney states that petitioner "agreed to assist an old high school friend [Hines] and another high school acquaintance[, Watts] – by then a drug

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[7]Petitioner is represented in the clemency proceeding by Gregg Shapiro of the Boston law firm of Choate, Hall & Stewart, along with Jennifer J. Aresco, Lisa M. Schwartz, and A. Hugh Scott, also lawyers with the firm.

[8]Petitioner's affidavit states that he knew Hines as a football teammate from high school and knew that after high school Hines had been dealing drugs for Teano Watts, whom petitioner knew to be the head of a major Mobile drug-distribution ring. According to petitioner's affidavit, Hines in the Spring of 1992 told him that Watts had been having problems with maintaining a supply of cocaine and asked petitioner whether he knew any drug suppliers in Baton Rouge. Petitioner states that he knew that one of his friends and classmates in college, Ricky Chisholm, had a brother who had a reputation for being involved in dealing cocaine. Petitioner's affidavit continues: "I then made the biggest mistake of my life. Although I knew it was wrong to get involved, I informed [Hines] that Ricky Chisholm's brother, Gary, might be able to provide Teano with cocaine." He further states that he was present at the transaction and acted as intermediary at Watts' request, which Watts communicated through Hines, because Watts did not know and therefore did not trust Chisholm and petitioner "was acquainted with both parties." He states that he "agreed to do so although [he] knew it was against the law." Petitioner further describes going to Houston, getting the drugs, and delivering them to Watts, and states that he received $1,500 for his role in the transaction. He then describes traveling to Houston a few weeks later to be present at a second 15-kilogram transaction, which "was thwarted by a robbery."

[9]Petitioner testified in his first trial that his grandfather died in December 1989. In his affidavit, he stated that his grandfather died in December 1991.

kingpin – to purchase several kilograms of cocaine," and "participated in one drug purchase and in a failed attempt to purchase additional drugs." He notes that petitioner "did not use a gun or commit any act of violence" and "received $1,500 for his efforts." The memorandum advises that the "high school friend, the kingpin, and other long-standing members of the drug conspiracy" pleaded guilty, identified petitioner as a conspirator, and "received sentences of between two and eight years in prison," from which "[a]ll of them are now free."

Petitioner, on the other hand, according to his attorney, "had no information to offer the government and took his case to trial," resulting in "three life terms in prison without the possibility of parole." His attorney states that it is petitioner's recollection that he was advised by his lawyer in the trial phase that the government was interested in information concerning Ricky Chisholm and would not allow him to plead guilty without providing information about Ricky Chisholm or another person involved with drugs.[10] While noting that petitioner "did not admit his participation in the conspiracy," his attorney states that petitioner "made two terrible mistakes, first by associating with known drug dealers and assisting them with a large drug transaction, and then by failing to admit his criminal behavior at trial." He nonetheless argues that these mistakes "should not justify a sentence of life behind bars."

In his attorney's view, the following facts demonstrate that petitioner "deserves a grant of executive clemency":

> When he was 23 years old, he committed one serious, but non-violent, crime. Before his arrest, he had made it out of the projects and into a reputable four-year college from which he was about to graduate.[11] . . . [D]uring his subsequent incarceration, [petitioner] has continued to work hard and has received consistently superlative evaluations from his work supervisors and prison counselors. Meanwhile, he already has served a longer prison term than his co-conspirators who had larger roles in the conspiracy and long histories of criminal conduct. . . . [I]t serves no just purpose to keep [petitioner] in prison for the rest of his life. He recognizes that he made a terrible mistake. . . . [H]e has demonstrated the potential to play a constructive role in society. He should be permitted to return to it.

In support of petitioner's request for commutation, petitioner's attorney submitted an affidavit from one of the jurors in petitioner's trial. The affidavit states that petitioner's life sentence "was way too much." The juror averred that he agreed with much of what the affidavit

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[10]Petitioner's clemency attorney states that it is petitioner's recollection that he watched through a two-way mirror as Gary Chisholm was interrogated by the police. He also reports, however, that petitioner's trial counsel does not recall being involved in any plea negotiations on petitioner's behalf and that neither of petitioner's attorneys during the trial proceedings provided to his clemency counsel files relating to the pretrial proceedings.

[11]Although petitioner was offered full athletic scholarships at Mississippi Valley State University, Alabama A & M University, the University of Southern Mississippi, and Alabama State University, he says he decided to attend Southern University after spending the summer following high school at football practice at Mississippi Valley State because Southern was more academically challenging and had a better football program.

prepared by petitioner's attorney stated,[12] and wrote at the bottom "I would be pleased if President Bush pardoned [petitioner]."

Petitioner's criminal case has been the subject of some degree of publicity. His case was one of many featured in a segment of the Public Broadcasting System's program *Frontline* entitled "Snitch," which was first aired on January 12, 1999.[13] Most recently, articles have appeared in the San Francisco Examiner concerning petitioner's case.[14]

The United States Attorney for the Southern District of Alabama, the Honorable David P. York, opposes clemency, stating that "nothing in the record or in the petition suggests that [he] deserves consideration for clemency." Finding that "some of [petitioner's] assertions are false and need to be corrected," the United States Attorney points to misstatements in the commutation application. The United States Attorney advises that petitioner "never admitted his involvement at trial or sentencing," which he believes is "[c]ontrary to both [petitioner's] and his family's contentions." Further, the United States Attorney disputes petitioner's contention that he and his attorney observed Chisholm's being interrogated when he was housed in a local jail, stating that Chisholm was not interviewed and that neither petitioner nor his attorney would have had access to view Chisholm while Chisholm was in custody.[15]

The United States Attorney also faults petitioner's statement that he "merely participated in a cocaine sale." In his view, petitioner is "disingenuous" by failing to state that one sale involved nine kilograms of drugs with a purchase price of $200,000 and the other involved a proposed sale of 15 kilograms for a quarter of a million dollars. The United States Attorney

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[12]Among the statements set forth in the juror's affidavit are the following: "Most, if not all of [petitioner's] co-conspirators . . . played larger roles in the conspiracy than he did. I believe [he] should . . . be free now. His crime did not deserve a life sentence, and it was certainly less serious a crime than the crimes committed by many of his co-conspirators."

[13]See note 6, *supra*. In his interview, petitioner stated that he introduced Hines and Chisholm, for which he was paid $1,500. Asked whether he was "involved in trafficking," petitioner initially responded "[n]ot directly" and then "[s]omewhat I was, yeah," although he denied knowing the purpose of the meeting between Chisholm and Hines. He further stated that the government's witnesses lied and that he believes they "picked on" him because he had no information to trade. He added concerning the nine kilograms of cocaine: "There wasn't no drugs to be seen. Ain't nobody got no drugs. So I don't know how they came by [that] number." He stated that he was "guilty of hooking up the two parties," who he knew "was in some type of drug activities," but that his role in the offense was less than that of Hines and Wiley and that he "shouldn't have got no more even than the minimum of probation, the most boot camp or five years in prison." More generally, he implied that the cooperating witnesses, with the prosecutor's knowledge, committed perjury. The date of the interview is not stated, but presumably was in late 1998 or early 1999.

[14]*E.g.* Debra J. Saunders, "In America, Punishment Should Fit Crime," *San Francisco Chronicle,* December 30, 2001, D 11; Debra J. Saunders, "Free Clarence Aaron," *San Francisco Chronicle*, December 10, 2002, A 27; Debra J. Saunders, "Puny Mercy," *San Francisco Chronicle*, December 27, 2002, A 29.

[15]Petitioner's affidavit describes an event that he says was witnessed by him and Bob Clark, his grandfather's estate planning lawyer, to whom petitioner turned when he learned the FBI was looking for him. He states that he and Clark watched through a two-way mirror as the FBI questioned Gary Chisholm and that Clark told him that the prosecutors refused his request to plead guilty without informing on anyone else. *See also* note 10, *supra*. According to petitioner, a mistrial was declared because Clark was first approached by Perry and so had a conflict of interest. Clark was disqualified from representing petitioner in the second trial.

further takes issue with the claim that petitioner occupied a minor role in the drug activity, believing it an example of how petitioner "continues to downplay his role in a large cocaine and crack cocaine conspiracy."[16] In the United States Attorney's estimation, petitioner had a "decision making, managerial role in the scheme," and "was hardly the struggling college student he attempts to portray himself as today as he spent his time driving and flying to and from Texas for major cocaine transactions." The United States Attorney further asserts that petitioner's "crime is neither non-violent nor victimless" and notes that "[c]ountless victims of crime would be entitled to hold [petitioner] responsible, from users who would overdose, to innocent property owners whose homes would be burglarized, to citizens who would be held up at gunpoint, all to support the habits of untold numbers of addicts."

Further, the United States Attorney advises that petitioner "was given ample opportunity to enter a guilty plea, with or without cooperation." Instead, petitioner "attributes his conviction to a 'mistake' that he made" and "does not admit his own criminal conduct or the extent of his involvement, nor does he express contrition for what he did." For these reasons, the United States Attorney believes that petitioner is undeserving of clemency.

The sentencing judge, Chief Judge Charles R. Butler, Jr., advised the Pardon Attorney that because of the differing roles of the executive and the judicial branches of government, he "feel[s] it inappropriate for [him] to offer any 'comments or recommendations concerning the merits of [petitioner's] clemency request,' just as [he] would feel it inappropriate for [the Office of the Pardon Attorney] to comment on [his] role as the trial and sentencing judge in this case."

Reasons for denial:

Imposing a life sentence without parole for a then 24-year-old with no criminal record is indeed a stringent punishment. While petitioner, perhaps understandably, continues to question its fairness, I do not believe he has demonstrated a basis for commuting his sentence at this time. The amount of crack with which he was associated itself would call for a sentence of at least 235 months, quite apart from his role in the offense and his false testimony during his trial. It also appears that he was more involved in drug trafficking that he even now has admitted.

The fact that other very culpable defendants received rather paltry sentences, especially, but not only, in comparison to that imposed upon petitioner, does not compel a grant of clemency. Their windfall does not in itself establish that petitioner's sentence is unjust, and certainly does not in itself justify commuting petitioner's sentence to time served, especially in light of his continuing failure to fully admit and accept responsibility for his criminal conduct. I note that one of petitioner's codefendants (Gary Chisholm, now 38 years old) is serving a very lengthy sentence as well. It may be that, in the future, justice in petitioner's case may be

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[16]As evidence of petitioner's greater role, the United States Attorney cites the following activities by petitioner: he set up the nine-kilogram deal; traveled from Mobile to Houston with $200,000; hired someone to transport the drugs; delivered the drugs to the purchaser in Mobile; provided the scale used to weigh the drugs; drove a conspirator around Mobile to sell one of the kilograms of crack; set up the 15-kilogram deal; transported $250,000 from Mobile to Texas; provided one-half kilogram of cocaine powder to a conspirator; participated in converting the half-kilogram to crack; and sold the half-kilogram of crack.

achieved short of a true life sentence, but consideration of mitigation should await a full development of the intervening circumstances and situation at that time. Given the serious nature of petitioner's offenses and the absence of a compelling basis for mitigating his sentence at this point, I must recommend that you deny his clemency request.

Respectfully submitted,

Deputy Attorney General

Date:_____